

FEDERAL CIRCUIT COURT OF AUSTRALIA

HELLER v MINISTER FOR HOME AFFAIRS & ANOR [2019] FCCA 2940

Catchwords:

MIGRATION – Review of administrative appeals decision – whether decision affected by jurisdictional error – jurisdictional error not established – application dismissed.

Legislation:

Migration Act 1958 (Cth)

Migration Regulations 1994 (Cth), Reg.2.03A

Applicant:	ARIANE MADELEINE HELLER
First Respondent:	MINISTER FOR HOME AFFAIRS
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	BRG 1188 of 2018
Judgment of:	Judge Vasta
Hearing date:	23 September 2019
Date of Last Submission:	23 September 2019
Delivered at:	Brisbane
Delivered on:	23 September 2019

REPRESENTATION

Applicant in person

Solicitors for the First Respondent: Sparke Helmore

ORDERS

- (1) The Application for extension of time for filing is refused.
- (2) The Applicant pay the First Respondent's cost of and incidental to the application fixed in the sum of \$6,500.00.

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT BRISBANE

BRG 1188 of 2018

ARIANE MADELEINE HELLER

Applicant

And

MINISTER FOR HOME AFFAIRS

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

(Ex Tempore)

1. On 30 August 2017, the Administrative Appeals Tribunal (“the AAT”) affirmed a decision of the delegate of the Minister for Home Affairs not to grant the Applicant a Partner Visa. On 13 November 2018, the Applicant filed an originating application asking this Court to review the decision of the AAT.
2. As one can tell from the dates I have just read into the record, the application was made well and truly outside the 35 day limit. In fact, it was some 405 days after that limit, or some 440 days after the decision had been made. Because of this, the Applicant must convince this

Court that the Court should extend the time in which the Applicant is able to file an application.

3. In doing so, the Court looks at the question of delay and why there was delay, and, secondly, looks at whether the merits of the application itself are such that the Court should hear the matter. The third matter that the Court looks at is what is the prejudice to the First Respondent. In this case, the First Respondent has quite properly not pointed to any prejudice. So therefore, the Court only needs to look at the first two aspects.
4. The background of this matter is that the Applicant is a national of Germany. She was born in Berlin on 11 January 1958. She travelled to Australia on a visitor visa on 21 December 2007 and departed on 11 January 2008. She arrived again in Australia on 5 February 2010 on a visitor visa and her last substantive visa was a temporary work visa that was granted on 29 June 2011, and ceased on 22 October 2014. That visa was cancelled on 22 October 2014. On 23 October 2015, the Applicant applied for a Partner Visa on the basis of her relationship with her Sponsor, a person by the name of Christopher Elmer Strue.
5. The AAT was obliged to look at the genuineness of the relationship between the Applicant and the Sponsor. There had been quite a history to this hearing, with a number of adjournments. On the day of the hearing, 30 May 2017, the Applicant appeared by teleconference. There is a transcript of what occurred at that time. I will refer to that a little later on in these reasons. However, the upshot of it was that the Applicant declined to be sworn in and to give any further oral evidence.
6. The Tribunal then had all the evidence that had been submitted to it to decide the matter. The AAT then looked at all of that evidence to look at the genuineness of the relationship.
7. The parties had met on 1 June 2012 at a laundromat. They claimed they commenced their de facto relationship on 8 June 2013. They were living at separate addresses. The Tribunal summed up the consideration of the claims in paragraph 23 saying:

An issue in the present case is whether the applicant and the sponsor were, at the time of the visa application and continue to

be at the time of the decision, in a genuine and continuing de facto relationship to the exclusion of all others as defined under section 5CB of the Migration Act. Another issue in this case is whether the applicant has compelling reasons for not lodging the partner visa application within 28 days of her last substantive visa and for not applying the criteria in schedule 3 to the regulations. In the present case also, the applicant claims she has been the victim of family violence.

8. The AAT did go through the relevant law and then looked at whether the parties were in a de facto relationship. In short form, the AAT looked at the financial aspects of the relationship as to:- whether there was joint ownership of assets; joint liabilities; the extent of pooling of financial resources; any legal obligations owed to each of the parties by the other; and, any sharing of day to day household expenses. The Tribunal said at paragraph 39:

At the time of review, there was no evidence of a probative nature before the Tribunal about the financial aspects of the parties' relationship and no plausible explanation has been offered in relation to the withholding of this information. The Tribunal has given no weight to the financial aspects of the relationship when considering whether the parties were in a genuine and mutually committed de facto partnership. The Tribunal is not satisfied the parties exhibit the financial aspects of a de facto partner relationship, at the time of the application or at the time of the review.

9. The Tribunal then looked at the nature of the household and looked at all of the statements that had been given by both the Sponsor, the Applicant and many others. At paragraph 45 the Tribunal said:

The Tribunal has given negligible weight to the household arrangements of the parties' relationship. The Tribunal is not satisfied that the parties lived together at the time of application or at the time of review and have established a household consistent with a couple in a genuine and mutually committed de facto relationship.

10. The Tribunal then looked at the social aspects of the relationship and had a great deal of consideration of all of the material that the Applicant, the Sponsor and many other had given to the Tribunal. At paragraph 52 the Tribunal said:

The Tribunal has given negligible weight to the evidence supporting the parties' social aspects of the de facto relationship. The Tribunal is not satisfied that at the time of review, the applicant and the sponsor present themselves to family and friends as being in a committed partner relationship, or are regarded by others as such.

11. The Tribunal then looked at the nature of the commitment by the Applicant and the Sponsor to each other. The Tribunal said at paragraph 56:

Overall, the Tribunal finds that, at the time of application and at the time of review, there was a lack of persuasive and credible evidence of the parties' shared finances, of cohabitation or establishment of a common household, of joint social activities or social recognition of the relationship and of a mutual commitment to one another. On the applicant's own admission, the parties were not living together and the relationship had soured. The Tribunal is not satisfied that at the time of this decision, the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others.

12. The Tribunal then took into account that the Applicant had advised the Tribunal, in her Form 14.10, that the relationship with the Sponsor had not been "together for months" and that the whole chain of abusive behaviour by the Sponsor over at least one year had had a huge impact on her and her children's wellbeing. The Applicant claimed, however, that she was still in a de facto relationship with the Sponsor. Her advice to the Tribunal was that the relationship had not ended.
13. The Tribunal was not satisfied that there was a genuine and continuing relationship, and the Tribunal was not satisfied that the parties lived together and not separately or apart on a permanent basis.
14. The Tribunal was not satisfied that the Applicant met the additional criteria prescribed in Reg.2.03A of the *Migration Regulations 1994* (Cth) ("the Regulations") that there was a de facto relationship between the parties that had existed for at least 12 months prior to the lodging of a Partner Visa application.
15. The Tribunal looked at whether Schedule 3 of the criteria, contained in the Regulations; that is, whether there were compelling and compassionate reasons as to why the Applicant should not have to go

and make the application offshore. After considering all of those matters in quite some detail, the Tribunal came to the conclusion, at paragraph 97, that they were not satisfied that there were compelling reasons for not applying the Schedule 3 criteria.

16. The Tribunal then looked at whether a claim of family violence had been made under the Regulations. Paragraphs 98 to 107 of the Tribunal's reasons deal with this matter. The Tribunal came to the conclusion that there had not been a claim of family violence that had been established.

17. The Tribunal looked at all other additional considerations but then came to the conclusion that the Applicant did not meet the requirements of the visa and, therefore, the decision was affirmed.

18. The amended application has three grounds, they are:

1. The decision making of the AAT was UNFAIR and BIASED;

2. The time of the AAT-Hearing coincided with the split up from my 'sponsor' on the grounds of DOMESTIC VIOLENCE.

The AAT should have taken into account that:

a. I was hugely distressed at the time

b. not only my partnership had fallen apart, but my life

c. Domestic Violence can be a game changer in such a situation.

3. The AAT-hearing and the AAT decision record reflect quite well, not that the AAT decision maker had come to see me as a trouble-maker instead of seeing me as a person in severe trouble because of someone else's, my 'sponsor's' failure.

19. This matter has had a history. On 30 January 2019, Registrar Belcher made an order that the hearing would occur before me on 4 July 2019. The Applicant appeared by telephone on that day and asked for an adjournment because of illness. I granted that adjournment until 19 July 2019. Just before that date, the Applicant contacted my Chambers, telling my Associates that she was to receive her German pension very soon and would be able to afford a lawyer, and asked for a further adjournment to the beginning of September 2019. I granted

her the adjournment until today's date, 23 September 2019. The Applicant has appeared in person before me and has made oral arguments in a quite lucid way.

20. What the Applicant has said to me is that she always knew that she could lodge a review, but if she had lodged a review within the 35 days, she knew that she had no merits. She said that it was new information that then came to her attention; that is, that a Partner Visa can be given if there had been domestic violence perpetrated within the relationship. Once she realised this, she contacted a lawyer and set this matter in train.
21. There is still a flaw in that argument. To be eligible for a Partner Visa, because of domestic violence, is not straight-forward and it is an exception to the rule that the relationship must be an on-going relationship. In layman's terms, if a relationship existed at the time of the application, or had existed, but was no longer in existence, then the reason why the relationship was no longer in existence could be considered. The Delegate or the AAT can look at whether domestic violence had been the reason why a genuine relationship was no longer in existence. In those cases, a Delegate or an AAT member can grant the visa.
22. The Applicant in this case says that she did not understand that that was able to be done beforehand. That seems to fly in the face of the Delegate's decision, which physically appended to it the Regulations that related to domestic violence. The Applicant said that she knew about that and she could read those matters, but, at that time, she did not have any evidence of domestic violence. In effect, she said that there was no merit in any application, at that stage, but there is merit in the application now.
23. Unfortunately, the matter will only have merit if there was a genuine relationship to start with. The AAT had made an almost emphatic conclusion that there was no genuine relationship that was in existence, so such a relationship could not have ended because of domestic violence when the relationship did not get to that point in the first place. It seems to me that that is a very important circumstance to bear in consideration of this matter.

24. The other matters that the Applicant really complains of is that she was seeking an adjournment at the time that she spoke to the AAT. That is clear. On two occasions, she asked whether the matter could be postponed. The first time was at the beginning of the interchange. The second time was at 10 minutes and 48 seconds into the recording, where she said (according to the transcript annexed to her Affidavit filed 19 September 2019):

Is there... I'm so sorry. I don't want to be stubborn, but is there any chance to postpone this hearing, by a reasonable time, so that I can get myself re-assorted, can sort of...

25. The AAT interrupted her and said:

Okay, well I'll just answer that by saying the tribunals has postponed this hearing, at your request, at several times.

26. The applicant responded:

Well, yeah. But very... That was always a very, very short period of time. I was always, like, "Thanks for that. I appreciate that a lot"

27. Then the AAT interrupted:

And you did agree to appear before the tribunal last Friday. I understand there were circumstances beyond your control.

28. The Applicant said:

Yeah, because I felt really compelled to it. I felt like postponing and postponing and postponing and postponing does not sort of... For me, it didn't make any sense. It didn't feel any good at this point in time. And I just wanted to speak to somebody who was a decision maker, like you, who has already...

29. The AAT interrupted, but the Applicant was saying:

But they wouldn't be able to make a decision, would they?

30. The AAT said:

Could I just put this to you now, then? I hear what you're saying, don't get me wrong. I do understand what you're saying. The postponement, though has been at your request. The tribunal has been very accommodating in my view.

31. The Applicant said:

I have. I understand that Yes.

32. The Tribunal said:

And it's just an opportunity that's has been offered to you to appear, now. If you have some reservations about giving evidence today, and I hear that from you, then it may well be not in your interest to proceed today. It's your decision. And I'm going to put it back to you to decide whether you wish to appear at this tribunal hearing or not? But, if you do wish to appear, then I have to make it clear to you, you will need to be sworn in, to give evidence. The information that you provide me this afternoon, is part of the lawful process.

33. It was clear, in what was being said there, that whilst the Applicant was making an application for an adjournment, the Tribunal was not going to adjourn the matter because it had been adjourned a number of times before. The Applicant has said orally to me that when one listens to the hearing, as I have done, that there is an undercurrent of the Tribunal member just wanting to proceed and to have the matter heard. The Applicant says “almost at any cost”, that there was not going to be any derailment of the process that the AAT member had put in place.
34. There may be something to what the Applicant has said, but the question is whether the attitude by the AAT was reasonable. The AAT has, in their reasons, spoken of the number of adjournments that had been given to the Applicant in this matter and the Tribunal was of the view that the matter simply needed to be heard. The Tribunal's reasoning, at paragraphs 11 to 13, is consistent with the power of the Tribunal and, given the history of the matter, is not unreasonable. It could never be said that it was either unfair or biased.
35. It seems to me, then, when one looks at the main complaints that the Applicant has, that there is very little merit in them. Many of the other matters that the Applicant complains of are really incidental to those matters and, when dealing with the main matters, it deals with those aspects of what it is that the Applicant complains of.
36. But in the end, the decision that the Tribunal came to was that there was no genuine relationship. That, on the evidence before the Tribunal,

was a conclusion that was open to it. Having come to that conclusion, it really matters not know whether the Applicant has had this new information about domestic violence because, unless there was a genuine relationship at any stage, the matter of domestic violence does not come into the aspect.

37. One can understand why the Applicant may feel that things have not gone in a way that she would have thought they would have gone, but nevertheless, the Tribunal has acted within the bounds of procedural fairness, as laid out in the *Migration Act 1958* (Cth), and has come to decisions that are open to it.
38. I am not convinced that there has been an adequate explanation for the delay and I am not convinced that there is sufficient merit in the application itself to warrant the Court hearing it.
39. Therefore, I refuse the application to extend the time in which to file the application and, in all other respects, the application is dismissed with costs in the sum of \$6,500.

I certify that the preceding thirty-one (31) paragraphs are a true copy of the reasons for judgment of Judge Vasta

Date: 16 October 2019